No. 22544

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AUG 10 1968

Associated Independent Owner-Operators, Inc.,

Petitioner,

vs.

National Labor Relations Board,

Respondent.

REPLY BRIEF OF PETITIONER.

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I.

Statement of the Case.

In its statement of the case, intervenor adopts the recitations of the petition "only to the extent that they are consistent with the exceptions noted in Appendix 'A' attached" to intervenor's Brief. It is submitted that the five exceptions to appellant's statement of the case are specious.

Exceptions Nos. 1, 2 and 4 argue that the Board did not affirm the Trial Examiner's findings of violations of Section 8(b)(4) of the Act, assuming Vance and Watson to be independent contractors. We read the Board decision differently since the findings, conclusions, and recommendations of the Trial Examiner relating to a finding of violation (except for the inde-

pendent contractor issue) are entirely "consistent [with]" the Board decision. However, the distinction is of no consequence since the violation of the Act is obvious from a reading of the Trial Examiner's decision. After an appropriate remand of the case to the Board, we have no doubt concerning the Board's disposition of the case.

In exception No. 3, intervenor objects to our reference to an investigation by the General Counsel "sustaining" the charges. Section 102.74 of the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series "A" as amended, provides (under the Section heading "*Complaint and Formal Proceedings*") that "if it appears to the Regional Director [after full investigation] that the charge has merit, formal proceedings in respect thereto shall be instituted in accordance with the procedures prescribed in Sections 102.15 to 102.51, inclusive," *i.e.*, the issuance of complaint and subsequent procedures. *Black's Law Dictionary, Fourth Edition*, defines "sustain" as "to support; to warrant." It is clear that the General Counsel, acting through the Regional Director, made the preliminary determination that the charge had merit, *i.e.*, "sustained" the charge, before he issued complaint thereon. Indeed, the issuance of complaint without such determination would have been a flagrant violation of duty.

Finally, in exception No. 5, intervenor quotes from page 39 of the transcript in an attempt to demonstrate one item of evidence of "control reserved or control exercised in fact by the contractor."

Following the witness's acquiescence in the leading question by the Trial Examiner, *i.e.*, "there was no

supervision from Carl's Trenching and Digging Company on the job, was there?", the attorney for the General Counsel of the National Labor Relations Board then re-examined the witness on that answer. The pertinent testimony follows:

> "Q. (By Mrs. Robbins) Mr. Fletcher, you said that you told Vance how to do his work.
>
> Would you explain what you mean? What did you tell him?
>
> A. What I tell him is this: 'this loose dirt, we want you to take your loader and haul it and move it away and level it out and spread it—take it out on the lot and spread it, and as the drill rigs—keep ahead of them, and keep up with them,' and that is it.
>
> Q. Then if he did in fact spread the dirt, did you give him any further instructions on what to do?
>
> A. No. That is all that I tell him.
>
> Q. Did you tell him this every day, or—
>
> A. Just one time. The first day he arrived you give the orders what is to be done, and that is all you need to do.
>
> Q. And then it was up to him to do it?
>
> A. Right."

If either "control reserved or control exercised in fact" is established by an initial description by the customer to the independent contractor of the nature of the work he is to perform, then not a single independent contract arrangement is free from attack on the theory that a conversation between the contracting parties makes them, in fact, employer and employee.

II.

Argument.

The Board frankly acknowledges in its Brief that "there were elements in Vance and Watson's work relationships which are often associated with independent-contractor status," and that it may be "difficult to say whether [Vance and Watson are] employee[s] or . . . independent contractor[s]." (Board's Brief, pp. 10 and 11.) The Board proceeds to argue in effect that the Board is entitled to be wrong, if only barely so, under authority of *NLRB v. United Insurance Co.,* 390 U.S. 254, 260.

The Board has graciously conceded that we have our foot in the door. We now propose to open wide that door.

Both the Board and the intervenor argue that it is *control reserved* and not *control exercised* that is significant, quite ignoring the fact that in many cases the only evidence of control reserved is that which may be inferred from control exercised.

Here the distinction between control reserved and control exercised is unimportant, since neither existed in fact. (See discussion of intervenor's Objection No. 5 in "Statement of the Case" hereinabove.) Since the record contains no such evidence of control, it was necessary for the Board to find control "apparent." Thus, the Board found [R. 45] that the "supervision exercised over Vance and Watson" was, in the "context of the work to be performed," "*apparently* no less than

that exercised over acknowledged employees of the various contractors." (Emphasis added.)

In its reference to the "context of the work to be performed," the Board is saying in effect that there just cannot be an effective independent contractor relationship between Vance and Watson (or like owner-operators) and their customers, *whatever may be intended by the parties,* and *whatever may be the other facts and circumstances,* so don't even try to create one. Thus, the Board has fenced off an area within the construction industry and marked it with a sign "independent contractors keep out."

Both the Board and the intervenor persist in the misstatement that "Vance and Watson were *hourly paid.*" (Board Brief, p. 10.) The emphasis is that of the Board, and the false implication is that Vance and Watson, work for an hourly *wage.* The truth is, of course, otherwise. The mechanic who repairs your car and the plumber who repairs your sink are not made your employees by virtue of the fact that the charge to you is on an hourly basis. Such charges are not, as implied here, hourly wages.

We now look to the *Shamrock Dairy* standards approved by this court in *NLRB v. Servette, Inc.,* 313 F. 2d 67 (C.A. 9, 1962).

1. Vance and Watson did not "work for wages or salaries."

2. Vance and Watson did not work "under direct supervision."

3. Vance and Watson did "undertake to do a job for a price and decide how the work [was to] be done." The customers bargained for results, not means.

4. While Vance and Watson did not "usually hire others to do the work," this is a feature in common with *Servette,* and with all of the cases cited at pages 16 and 17 of our opening Brief. Indeed, in *Servette* the dozen driver-salesmen in question enjoyed admitted employee status for many years prior to their conversion to independent contractor status.

Vance and Watson own or rent the equipment they use, pay all of their own costs, including insurance, fuel, repairs, and services on their equipment as well as bookkeeping, telephone, advertising and parking expenses. No deductions for social security or income tax are made. During the last year Vance performed services for about 100 customers and Watson for approximately 75. Watson has signed a collective bargaining agreement with petitioner [Tr. Vol. I, p. 4], whereas Vance brought a legal action, rather than a Labor Commissioner claim, when he was owed money. [Tr. Vol. II, p. 96.]

Despite all of the foregoing indicia that Vance and Watson considered themselves to be independent contractors and consistently behaved as such, the Board makes the startling statement in footnote 12 of its Brief that "the record provides little support for petitioner's contention that the parties 'believed they were creating a principal-independent contractor relationship and not an employer-employee relationship.' "

If, then, we set aside the Board contention of "apparent" control, the only remaining indicia of an employer-employee relationship are (1) that Vance and Watson worked for themselves, *i.e.,* did not have employees, and (2) neither Vance nor Watson possessed a license as a contractor.

The factual findings of the Trial Examiner [Tr. Vol. I, p. 31] are clearly supported by the record, and as clearly require the finding that Vance and Watson are self-employed persons and not employees:

> "The persons for whom Vance and Watson performed work had the right of control only over the end to be achieved and not over the means to be used in reaching such end. Vance and Watson were independent contractors in law and as a matter of economic reality. They were persons and self employed persons. They determined their own profits by what they paid for, or the rate at which they rented, their equipment; they set their own rates of pay; they determined what repairs and services they needed and arranged for the same to be done; they determined what insurance they needed and paid for the same. They were told what they should do but it was substantially left to them as to how they should achieve the ends. They assumed the risks of their businesses. They were to accomplish results or to use care and skill in accomplishing results. The control exercised by the contractors with respect to Vance and Watson was limited to the achievements of a desired result and did not include control of the means. They were self employed persons within the meaning of the Act."

At page 5 of its Brief, intervenor makes the contention (despite its wholly contrary position at the time of the hearing) that the court should not look to the relationship of Vance and Watson to other persons, *i.e.*, their other customers, in determining the issue here. Intervenor would prefer that the Court wear blinders so that it can see no more than Vance operating a dump truck and Watson a skip loader, working on a job very much as employees work. It is only such a narrow view of the operations of Vance and Watson that can explain the Board's finding of employee status. When we look beyond, we see that Vance and Watson, in their relationship to *all* their customers, work not for wages but for profits, that they own or rent their equipment, that they maintain a regular place of business and incur substantial regular expenses, none of which are paid for by their customers, that they work for scores of customers in a given year, *i.e.,* not regularly for a single "employer," and that they have consistently treated themselves as self-employed persons by the signing of a collective bargaining agreement, by treating sums owed them as contract debts rather than wages, by setting the prices on jobs which they perform, and by being paid gross billings which do not reflect the numerous deductions which appear on every employee's paycheck.

III.

Conclusion.

We concur with the comment in footnote 14 of the Board's Brief that "should petitioners' contention be sustained . . . the case should be remanded for further proceedings consistent with the court's disposition of this issue."

We submit that the Board's decision was not "between two fairly conflicting views," that the Trial Examiner was correct in his finding that Vance and Watson are self-employed persons and not employees, and that the Board decision should be denied enforcement.

Dated: August 5, 1968.

Respectfully submitted,

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